IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 5 Original

STATE OF ARIZONA,

Complainant,

v.

STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CITY OF SAN DIEGO AND COUNTY OF SAN DIEGO,

Defendants,

UNITED STATES OF AMERICA and STATE OF NEVADA,

Intervenors,

STATE OF NEW MEXICO and STATE OF UTAH,

Impleaded Defendants.

CLOSING BRIEF OF IMPERIAL IRRIGATION DISTRICT

October 2, 1961

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TOPICS

TABLE OF AUTHORITIES CITED

TEXTBOOKS

CLOSING BRIEF OF IMPERIAL IRRIGATION DISTRICT

The Imperial Irrigation District as a defendant, owning and operating the largest California project involved herein and one of the very earliest developments, feels impelled in justice to its interests and in fairness to this Court to respond to matters contained, and also omitted, in the Brief of parties other than California defendants. Hence this Closing Brief on behalf of the Imperial Irrigation District.

Preliminary Statement

The matters before this Court on the Exceptions of the parties as briefed to now have gone far afield from the cause as plead and as tried. The result is that the inseparable influence and relevancy of the Compact on the decisions that must be made herein has been beclouded and is being lost sight of.

The Master's concept is that the only water rights or uses involved in this case are those from Lake Mead and the main stream below.[1]

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[1]The Master holds that rights to and uses of water in any or all Lower Basin tributaries are irrelevant and not chargeable *pro tanto* to the using state. (R. Pgs. 242, 226—except unexplainedly the Bill Williams R. Pg. 184.) This is held to apply, also, to the Gila River uses. (R. Pgs. 179 and Note 38; 184 Note 46; 231-232;) and to make the 265 miles of the main stream from Lee Ferry to Lake Mead a tributary and uses therefrom not accountable. (R. Pgs. 151 Note 18 and Pg. 183.) The Master even invalidates provisions of the Nevada Contract (Article 5(a), Pg. 420 R.) and the Arizona Contract (Art. 7(d) Pg. 401R.) charging those states pro tanto for uses above Lake Mead (R. Pgs. 207; 237 et seq.) This last holding Nevada and Arizona approve (Nev. Op. Br. Pgs. 19, 48, Nev. Rp. Bf. Pg. 49:— Ariz. Op. Br. Pgs. 100, 101.) In fact Arizona contends that provisions in her contract providing for Nevada, New Mexico and Utah to share in water uses as specified in Article 7(f), (g)(M.R. Pg. 402) are invalid (Ariz. Op. Br. Pgs. 29, 99, Rp.

Arizona goes so far as to contend that the Compact deals only with the main stream[2] on the basis that *supply* from the Upper Basin at Lee Ferry (Article III (d)) equals and is the same as the quantitative amount of *uses* (Article III(a)) at Lake Mead and below[3], undiminished by pro tanto charges for uses above Lake Mead.[4]

United States claims that the main stream from Lee Ferry down is involved[5] and with uses above Lake Mead, including tributaries, to be charged pro tanto to the states of use.[6]

Except for the claim of the United States for pro tanto charge for tributary uses above Lake Mead, the United States, Arizona and Nevada join in the contention that tributary rights and uses in any part of the Lower Basin are irrelevant and of no concern in this case.

The Master holds the Compact and the law of appropriation and equitable apportionment irrelevant to his "main stream"—i.e., waters of Lake Mead and main stream below[7]—though applicable to the Colorado River *System* in the Lower Basin, including the tributaries.[8]

Br. Pg. 88;) United States contends tributary and other uses above Lake Mead must necessarily be chargeable pro tanto to the state of use. U.S. Op. Br. Pgs. 15 et seq.; U.S. Rp. Br. Pg. 17.)

[2]Ariz. Op. Br. Pgs. 67, 72. Ariz. Rp. Br. Pg. 58 Note 73.

[3]Ariz. Op. Br. Pgs. 78 et seq.

[4]Ariz Op. Br. Pg. 101; Ariz. Rp. Br. Pg. 88.

[5]U.S. Op. Br. Pg. 9; U.S. Rp. Br. Pgs. 33-34.

[6]U.S. Op. Br. Pg. 15 et seq.; U.S. Rp. Br. Pg. 17.

[7]M.R. Pg. 138.

[8]M.R. Pgs. 142 re tributaries in *System*. M.R. bottom Pg. 140 re application law of appropriation.

The irrelevancy noted is upon the basis that the Project Act and Secretarial contracts are controlling.[9]

The issues herein are clearly drawn. Nevada and Arizona, naturally, support the Report and Recommended Deeree because it gives each the uncontrolled and additional use of tributary waters without accounting or charge pro tanto as against their respective state's rights in the Colorado River System. The qualified[10] support of the United States is upon the basis of purported validation of the contracts of the United States plus desired Federal controls.

We will attempt here to establish that no decision herein, whether as an intermediate or piecemeal adjudication of Lower Basin rights, can be made other than on a *System* as distinguished from so-called "main stream" basis. That the Compact and not merely the Project Act is inescapably and basically controlling in the administration of Lower Basin water rights and uses.

We shall try to be as objective as possible. We shall try to document why the Compact is *not* irrelevant and why the Compact is basically controlling on the water rights of the Lower Basin parties hereto. We shall try to document why water use rights in the Lower Basin *have* to be determined on a *System* (including all tributaries) basis and *cannot* be determined on a so-called "main stream" basis. We shall try to document why the Arizona Contract as construed by the Master is in

[9]M.R. Pg. 138.

[10]U.S. excepts to invalidating pro tanto charges for tributary and other uses above Lake Mead. (U.S. Op. Br. Pg. 1, Item 1) Also to application of state law as to when, where and in what quantity or priority water may be used in a state. (U.S. Op. Br. Pgs. 1-2, Items 2 and 3. Also Pgs. 21-23).

violation of not only the Compact, but in violation of, and contrary to, the Project Act. We shall try to document and demonstrate why priority of appropriation was and still is the applicable rule, subject to equitable apportionment considerations.

The foregoing may appear to be repetitious. May we assure this Court that we will limit any repetition to matters necessary to enable us to document our position and to set forth background matters necessary to point up our additional bases for our position herein.

Pre Compact Situation

Much has been written concerning the pre 1922 situation in the Colorado River Basin. The only reference we wish to make here to that subject is to a factual and physical or geographic error of the Master as to the Gila River. Also as to why the Gila River water uses, in particular, and all Lower Basin tributary uses, in general, were in 1922, we believe, considered as Lower Basin rights and uses in the Compact.

The Gila River Error:

The Master recognizes the right of a main stream appropriator to enjoin junior upstream tributary appropriators. He states, however, that California had no such claims against the Gila because "their points of diversion all being upstream from the confluence of the Gila with the main stream".[1] In a footnote the Master reiterates his concept that while the Gila River flows into the Colorado River, the confluence is below points

[1]Next to last paragraph Pg. 229 M.R.

of use in the United States and therefore of no consideration as a part of the System.[2]

The errors in this concept are these. Imperial's predecessors appropriated the waters of the Colorado River for diversion at what is called Hanlon Heading, a point several miles *below* the confluence of the Gila.[3] The appropriations were made principally before, but some after the 1900's.[4] Various physical structures were built as diversion works at Hanlon but all served the diversion purpose at that point until the All-American Canal went into operation[5] in 1940.[6] Also, deliveries of Colorado River water to Mexico under a Treaty were definitely contemplated in 1922.[7]

Following many previous United States investigations and reports concerning uses of Colorado River System water in the Lower Basin, Congress in 1920 directed a further examination and report concerning irrigation development of Imperial Valley and vicinity.[8] With respect to the Gila River it was reported that the drainage area was some 57,000 square miles.[9] That the average annual discharge of the Gila River to the Colorado River was 1,070,000 acre feet per annum and 6% of the total tributary contributions in the Colorado River Basin.[10] A possible site for a 2,200,000 acre

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[2]See footnote 46, Pg. 184, M.R. Also second paragraph in footnote 38 on Pg. 179 M.R.

[3]Tr. Pg. 6898, L. 9; Cal. Ex. 91, Tr. 6915.

[4]Cal. Exs. 70, 71-89; Tr. 6904-6912, 7088.

[5]Tr. 7037-7038.

[6]Tr. 7202.

[7]Art. III(c) Compact, Pg. 373 M.R.

[8]41 St. 600. See Pg. 196 Ariz. Ex. 45; Tr. 254 (Senate Doc. 142, 67th Cong. 2nd Session).

[9]Pg. 3, Ariz. Ex. 45.

[10]Pg. 2, Ariz. Ex. 45.

feet additional reservoir on the Gila was also referred to.[11] The run-off of the Gila into the Colorado from 1903-1920 is given on a monthly as well as a yearly basis.[12] Also see Arizona Exhibit 98 showing the Gila run-off from 1903-1950.[13] These run-off records report amounts, after existing Arizona uses, as high as four million acre feet in one year and some over two million acre feet and some over one million acre feet—per annum (1916, 1904, 1906, 1915, and 1909, 1917 and 1920 respectively).[13] In conjunction with this there is to be kept in mind that a dam and reservoir building program was being put into effect in Arizona on the Gila System. Roosevelt Dam on the Salt River in 1909[14] and Coolidge Dam on the Gila[15] were followed by a series totalling some eleven in number. As reported by the Master, their construction dates disclose the apparent reason for the complete impounding in Arizona of the run-off of the Gila System after 1941.[13] These matters, as of 1922, were reported by the Fall Davis Report to Congress in February 1922.[16] As it covers in detail the claims and uses in the Lower Basin as well as data on the Upper Basin, we submit it is reasonable to assume it was given study and consideration by the Compact Commissioners in their deliberations prior to November 1922.

The foregoing explains, in our opinion, why the claim of Arizona is unsound that the tributaries in the Lower

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[11]Pg. 8, Ariz. Ex. 45.
[12]Pg. 219, Ariz. Ex. 45.
[13]Ariz. Ex. 98. See Pgs. 708-9, U.S.G.S. Paper 1313, Tr. 363.
[13]Ariz. Ex. 98. See Pgs. 708-9, U.S.G.S. Paper 1313, Tr. 363.
[14]M.R. Pg. 40, Item 5.
[15]M.R. Pg. 39, Item 1.
[16]Ariz. Ex. 45, Pg. ix.

Basin, and particularly the Gila, were of no interest to the Upper Basin.[17] Also why, when Project Act opponents were seeking to eliminate tributaries from consideration and accounting as uses of System water while the Compact was up for ratification and the Project Act was being considered, proponents were so adamant on the inclusion of the Gila River. Also why the Compact was so understood and intentionally so. Rather than reprint the documentation of this we refer to the explanation of Herbert Hoover, as United States Commissioner, on the Compact, made known to Congress.[18] Also to the statement of Governor Emerson of Wyoming to the Senate Committee stating that the Gila is as much of a tributary as the Green in Wyoming.[19] Arizona may argue that with Imperial's diversions to be above the confluence of the Gila under the Project Act the Gila would no longer be of interest to the Upper Basin or to California. This point was raised during the debates and by Arizona. The reply given by Mr. Carpenter, one of the Compact Commissioners and an Upper Basin representative, we think answers this fully, showing why the System, including *all* tributaries, had to be accounted for not only as to the Upper Basin and to Imperial Valley, but because of obligations to Mexico.[20]

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[17]Next to last paragraph Pg. 74, Ariz. Op. Br.

[18]Cong.Record Jan. 30, 1923, Pgs. 2710-2713. Also see Appendix 205, Pg. A31 et seq. Sp.M. Ex. 4. The particularly pertinent parts are printed in Footnote 6, Pg. 81 Cal. Rp. Br.

[19]Cong. Rec. 69th 1st Session, Pg. 765 reprinted in part in Footnote 9 at Pg. 83, Cal. Rp. Br.

[20]See material Pgs. 89-96 Cal. Rp. Br. See especially Pgs. 93 through 96.

Early Appropriations of Water:

In the Fall Davis Report of February 1922 not only were the tributary waters of the Gila reported upon but the same report called attention to the matter of appropriations of water under state law.[21] Sufficiency of rights to irrigate Palo Verde Valley was expressed.[22] Appropriations for the Yuma Project are listed.[23] The area of public and private lands to be irrigated and referred to as Imperial Valley is given at 1,134,700 acres.[24] The Fall Davis Report refers to previous reports, including the All-American Canal Board Report[25] of 1919 which in turn had reported on notices of 1895-1899 to appropriate 10,000 second feet at Hanlon.[26] In fact, studies and reports to Congress of various departments of the United States concerning the navigability of the Colorado River and diversions therefrom for agricultural purposes were made beginning in 1890[27] and 1895.[28] Also there could be detailed a joint report of the United States Departments of State; Justice; and Corps of Engineers; Army and others in

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[21]Ariz. Ex. 45, third from last paragraph Pg. 13.

[22]Ariz. Ex. 45, paragraph under "Ownership" Pg. 57.

[23]Ariz. Ex. 45, paragraph headed "Appropriations" Pg. 63.

[24]Ariz. Ex. 45, chart in center of Pg. 80. This is the area and quantity originally intended to be irrigated at the time of the appropriations for Imperial Valley and so then reported. See Cal. Ex. 69 at Pg. 3 thereof. The diversion works and canal built had the capacity to divert 10,000 second feet. See Tr. Pg. 7200. The natural flow was adequate to sustain diversions of 4,000,000 a.f. per a. See Cal. Ex. 293, Tr. 8227, 8264, 8277 and Cal. Ex. 287, Tr. 8237. The appropriations were for 10,000 second feet. See Cal. Exs. 71-89, Tr. 6904, 7175.

[25]Cal. Ex. 185.

[26]Cal. Ex. 185, next to last paragraph Pg. 19.

[27]Cal. Ex. 56, Army Engineers.

[28]Cal. Ex. 57, Army Engineers.

1901-1902;[29] several other later reports[30] and permits from the War Department,[31] as well as reports to Congress by Presidents of the United States concerning protecting agricultural development.[32]

These matters, i.e., tributaries as a part of the Colorado River System and claims of appropriative rights for agricultural use—are mentioned to emphasize the notoriety of the topics and claims as the Compact was being drafted in 1922.

Another important event took place just before the meetings of the Compact Commissioners. It was the 1922 decision of this Court in Wyoming vs. Colorado[33] which after arguments for several days in 1916, 1917, 1918, 1921 and again in 1922 and decided June 1922,[34] finally settles the application of the law of appropriation of water interstate as well as intrastate in the Western states adhering to the law of priority of appropriation.[35] It was a landmark decision available to the Compact Commissioners as a guide. Mr. Delph Carpenter was not only one of the leading Compact Commissioners but counsel in the Wyoming-Colorado case. It would seem not to need argument to support the proposition that the principle of interstate applications of the law of prior appropriation was an estab-

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[29]Cal. Exs. 141-142. See in particular Ex. 141, Pgs. 11-14, 36, 56, 72-73.

[30]Cal. Ex. 143, Army Engineers; 145 Sec. of War; 140 Reclamation Service.

[31]Cal. Ex. 157 (1910); 162 (1916); Annual permits from the War Department were continued from 1916 until after 1930, Tr. 7529.

[32]Cal. Exs. 147 (1907); 152 (1912).

[33]259 U.S. 419; 66 L. Ed. 999 (1921).

[34]From headnote Pg. 1003 of 66 L.Ed.

[35]259 U.S. 419 at 465, 468, 470, 66 L.Ed. 999 at 1013, 1015-1016.

lished matter when the Compact was signed in November 1922.

With the foregoing pre Compact matters in mind, we feel justified in attaching to the language of the Compact drafted and signed in 1922 and ratified by Congress in 1929, the significance that *System* beyond question included all tributaries, including the Gila River. Also, that "rights as may now exist" related to and meant appropriative rights with their normal Western water law priorities. It is with the purpose of relating this concept to the language used in the Compact and trying to establish the inescapable relevancy and applicability of the Compact to all rights to use of any System water that we wish now to direct attention.

The Compact

The Master holds the Compact irrelevant[1] and only interbasin.[2] Nevada contends that the Compact, Project Act, Limitation Act and Reclamation Laws are a single body of laws.[3] Arizona contends that the Compact is purely a main stream matter[4] and only interbasin,[5] although Arizona contends the Compact and Project Act must be construed together and that the Master erred in that regard.[6] Arizona also contends the Project Act modified the Compact to limit the Compact to the main stream.[7] The United States contends that the Compact divided the System between Basins and

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[1]M.R. Pg. 138.
[2]M.R. bottom Pg. 139.
[3]Nev. Op. Br. Pg. 16.
[4]Ariz. Op. Br. Pg. 72; Ariz. Rp. Br. Pg. 58 note 73.
[5]Ariz. Rp. Br. Pgs. 32, 81.
[6]Ariz. Op. Br. Pg. 67.
[7]Ariz. Op. Br. Pg. 27, third paragraph from top of page.

the Project Act modified the Compact but that uses above Lake Mead should be accounted for pro tanto.[8] The United States is indefinite on the Compact application except to approve conditionally the Master's Report and reserve its position.[9] The position now seems to be that the language and meaning of the Compact as signed in 1922 is immaterial[10] and only Congressional intent in 1929 is material.[10]

That the Compact accomplished a division of the *beneficial consumptive uses* of the Colorado River *System* as between the Basins is generally agreed. On the basis that all the Compact dealt with is the main stream (Arizona's position) and that the Project Act is controlling and makes the Compact irrelevant (the Master's position partially concurred in by the United States but questioned in part by Arizona and the United States) little, if any, analysis of or attention to the application of the Compact has been made.

The Tributaries:

Inasmuch as the Master holds rights and uses on the tributaries to be immaterial and not subject to pro tanto charge to the states of use (including uses on the main stream above Lake Mead)[11] and invalidates pro tanto deductions in the Arizona and Nevada Contracts[12] (on the basis of the Project Act and contracts being controlling), may we analyze the Compact on this subject.[13]

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[8]U.S. Op. Br. Pgs. 10 et seq., U.S. Rp. Br. Pg. 8.
[9]U.S. Op. Br. Pg. 6 "Argument."
[10]U.S. Rp. Br. Pg. 33.
[11]M.R. Pgs. 183, 226, 242, 316, 325.
[12]M.R. Pgs. 207, 237.
[13]The effect of the Project Act is discussed later under that topic heading.

Use and Supply:

We believe that to interpret properly the Compact and its effect on the Project Act and Secretarial contracts there must be first kept in mind the distinction between *supply* on the one hand and the division of *beneficial consumptive uses* dealt with by the Compact on the other hand.

The obligations of the Upper Basin to furnish *supply* to the Lower Basin are contained in the following provisions of the Compact.

Article III(d) provides that the Upper Division will not cause the flow of the River at Lee Ferry to be depleted below an aggregate of 75,000,000 acre feet for any period of ten consecutive years reckoned in continuing progressive series.[14]

Article III(e) provides that the Upper Division shall not withhold water and the states of the Lower Division shall not require the delivery of water which cannot reasonably be applied to domestic and agricultural uses.[15]

Article III(c) provides that in the event of a treaty with Mexico giving rights to System water, such shall be supplied *first* from surplus *above* 16,000,000[16] acre feet of *uses* (7,500,000 in Upper Basin and 8,500,000 in Lower Basin) and then if there shall not be such surplus, one-half of the deficiency shall be supplied by each Basin, the Upper Basin's share to be delivered at Lee Ferry.[17]

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[14]M.R. Pg. 373.

[15]M.R. Pgs. 373-374.

[16]Articles III(a) and III(b).

[17]M.R. Pg. 373.

Turning now to the division made by the Compact between Basins, we find in Article III(a) that what is apportioned there is *not supply* but exclusive beneficial consumptive *use* in perpetuity. In other words, the exclusive *right* to beneficial consumptive *use* in *perpetuity* of 7,500,000 acre feet per annum in the Lower Basin.[18]

This vast distinction quantitatively between supply at Lee Ferry and uses at sites and places of *use* scattered throughout the Lower Basin is recognized by the Master. Claims that in the Compact supply and use are correlative (III(d) and III(a)) or that Article III(a) uses are confined to the main stream are rejected.[19] The Master points out that said *supply* is considerably smaller than uses given by Article III(a).[20]

Tributary Uses:

We, however, submit that there can be no room for argument, as made by Arizona, that the perpetual beneficial consumptive *uses* permitted to the Lower Basin do not include *all* Lower Basin tributary uses, including the Gila River beneficial consumptive uses. Article III(a) specifically says that the III(a) uses are "from the Colorado River System".[18] To further fortify this contention attention is called to Article II(a) of the Compact which expressly defines *System* as meaning Colorado River and its *tributaries* within the United

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[18]M.R. Pg. 373; Article III(a): "There is hereby apportioned from the Colorado River System in perpetuity to the Upper Basin and to the Lower Basin, respectively, the exclusive beneficial consumptive use of 7,500,000 acre-feet of water per annum, which shall include all water necessary for the supply of any rights which may now exist."

[19]M.R. Pgs. 142-143.

[20]M.R. Pg. 144, first paragraph.

States.[21] That the Project Act made no change in this situation is treated hereinafter under Project Act.

Appropriative Rights:

The foregoing is not all that Article III(a) of the Compact does. Having in mind the then current decision in Wyoming vs. Colorado holding the law of appropriation to be applicable to interstate streams and rights[22] and the Fall, Davis and other Reports calling attention to the Lower Basin claims to appropriative rights,[23] we submit that there is significant language in the Compact recognizing these claims. Article III(a) of the Compact provides that the 7,500,000 acre feet per annum of *System* beneficial consumptive uses apportioned to the Lower Basin shall "include *all* water necessary for the supply of any *rights which may now exist*".[18] We submit that in the atmosphere of 1922 this would be peculiar language and mere surplusage unless it had some purpose and definite meaning.

To us it had and still has a very plain and necessary meaning. To us it meant and means this. That the Lower Basin States agreed with the Upper Basin States that the total or aggregate of all Lower Basin *then existing rights* would be included within and *sat-*

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[21]M.R. Pg. 372.

[22]259 U.S. 419 at 465, 468, 470; 66 L.Ed. 999 at 1013, 1015-1016 (1922).

[23]See Pg. 8 supra.

[18]M.R. Pg. 373; Article III(a): "There is hereby apportioned from the Colorado River System in perpetuity to the Upper Basin and to the Lower Basin, respectively, the exclusive beneficial consumptive use of 7,500,000 acre-feet of water per annum, which shall include all water necessary for the supply of any rights which may now exist."

isfied from the *System* uses[24] in the Lower Basin. That quantitatively this relates to and means the permanent right to use[24] of the first 7,500,000 acre feet per annum.

To us this meant and means that this *perpetual* aggregate annual right to 7,500,000 acre feet of beneficial consumptive uses from the *System* in the Lower Basin was and is, as between the Lower Basin States, a competitive and adverse right in each Lower Basin State against the other, to a part of that total. To us it also meant and means that as to each Lower Basin State not only was there given protection of its existing *System* rights but each such state was and is correlatively chargeable, accounting-wise, with all its *System uses.*[24]

Compact Accounting:

This brings into focus the matter of the need of Compact accounting. May we digress from existing rights for a moment to try to demonstrate why we think Compact accounting is inevitable. Also, why this case cannot be disposed of here without Compact accounting.

Basin vs. Basin:

Taking this matter first from the standpoint of Compact accounting Basin vs. Basin, we again turn to Article III(c) of the Compact.[25] Under Articles III(a) and (b) the Lower Basin has the right to put to beneficial consumptive use 8,500,000 acre feet per annum from the *System,*[26] not simply the main stream. By

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[24]Meaning beneficial consumptive uses.
[25]M.R. Pg. 373.
[26]M.R. Pg. 373.

Article III(c) the Lower Basin is protected against the Upper Basin to the extent of the 8,500,000 annual acre feet use of *System*—not *main stream*—uses, as against the impact of the Mexican Treaty obligation.[27] The Upper Basin is likewise protected as to its 7,500,000 a.f. per a. of such uses. Then if there is a deficiency below 16,000,000 a.f. per a., Article III(c) requires each Basin to contribute in equal shares to the deficiency for Mexico.[28] It seems to us too clear for argument that before the Lower Basin may call on the Upper Basin for any part of the deficiency for Mexico the Lower Basin must first show that beneficial consumptive uses in the Lower Basin from all *System*—not simply main stream sources—have been exhausted to the extent of 8,500,000 a.f. per a. This calls for accounting.

State vs. State:

If Basin vs. Basin, all Lower Basin uses from System, as distinguished from uses of the main stream or some part thereof, are accountable before the Lower Basin can call upon the Upper Basin for water for Mexico, then what of the relation of the Lower Basin states one against the other as to such a System accounting? Before any Lower Basin state can be called upon to supply any part of a deficiency for Mexico is not that state as against other Lower Basin states entitled to participate in the System accounting of Lower Basin uses? It is to be remembered that under the Compact the uses the Lower Basin is given is of *Sys-*

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[27]Since fixed by Treaty as 1,500,000 a.f. per a. from all System sources net delivery into limitroph section of River at boundary. See Ariz. Ex. 4, Tr. 220 at Pgs. 1288 et seq. of Ex.

[28]M.R. Pg. 373.

tem, not merely "main stream" character—and includes tributaries by definition.[29] And is not each Lower Basin state against the other entitled under Article III(a) of the Compact to have its existing rights to III(a) *System* water uses protected against the inroads of uses not chargeable to or protected by the existing use provisions of Article III(a) or III(c)? Put in another way—may uses out of the main stream by any or all Lower Basin states total the amount of uses available to the Lower Basin by the Compact and any one or more Lower Basin states also make tributary uses in addition thereto? Is each Lower Basin state at liberty to make all the uses of non "main stream" waters at will and without limit or pro tanto charge and only be charged with its "main stream" uses as its total use of System uses permitted to the Lower Basin by the Compact? We submit this just can't be against the Upper Basin. We also submit that it is impossible between states of the Lower Basin. The aggregate of the Lower Basin states' uses, we submit, is controlled between states on the same bases as Basin vs. Basin, i.e., System—not "main stream" wise. We submit no state—one against the other—can be compelled to give up its III(a) uses as to a state using water in addition to its III(a) rights. If Arizona's uses on the Gila are III(a) uses, then we submit she can't have her full share of III(a) uses again from the main stream.

It is to be remembered that the Upper Basin as against the Lower Basin is entitled, before furnishing deficiency water for Mexico, to an accounting of all System Lower Basin uses up to 8,500,000 a.f. per a. This

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[29]Articles II(a), III(a) and (b), Pgs. 372-373, M.R.

same accounting, we submit, is available to and a right of each Lower Basin state against the other before the Lower Basin is to be required to give up *any part* of its *8,500,000* a.f. per a. of uses.

Compact Controlling:

The question may be asked as to why we stress the Compact so much when the Master agrees that the Compact includes all tributaries.[30] The reason is that the Master holds the Compact irrelevant[31] and the Project Act controlling.[32] To this we call attention to the fact that the Master fails to consider or apply the language of the Project Act making the Compact controlling. When Congress provided in the Project Act for ratification of the Compact, Congress also in the same Section of the Act provided (1) that the rights of the United States and those claiming under the United States should be subject to and controlled by the Compact as to the waters of the Colorado River and its *tributaries;*[33] and (2) that all contracts or other privileges from the United States or under its authority necessary or convenient for the use of the waters of the Colorado River or its *tributaries* shall likewise be subject to and controlled by the Compact.[34] But Congress did not stop there. It also provided that the *United States* as well as its contractees and users and *appropriators* of water from the reservoirs and *works provided for in the Project Act* should be *subject* to and *controlled* by the *Compact—notwithstanding anything in*

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[30]M.R. Pg. 142.
[31]M.R. Pg. 138.
[32]M.R. Pgs. 138, 151.
[33]Pro. Act, Section 13(a), Pg. 393 M.R.
[34]Pro. Act, Section 13(b), Pg. 393 M.R.

the Project Act to the contrary and that all contracts should so provide.[35] We submit these provisions, ignored by the Master and our opponents, are unanswerable and make the Compact not only relevant but controlling, and the matter before the Court a System and not a segmented "main stream" one.

The contracts of the parties do specifically provide that the Compact is controlling.[36] It is to be noted that these contract provisions,—as does Project Act Section 13(a),—include tributaries as being subject to the Compact.[37]

The Master reasons that there is no basis in law for regulation of the tributaries by the United States. As stated—"United States cannot by its operation and control of Hoover Dam regulate the flow of water in the tributaries—".[38] Also, the Master indicates that charging pro tanto uses on tributaries is contrary to Section 18 of the Project Act.[39] Section 18 leaves to the states the appropriation, use and control of water within their borders, except as modified by the Compact.[40] The Master overlooks the proposition that by *ratification* of the Compact the *states* have consented and *agreed* to an *accounting* of their beneficial consumptive uses on all parts of the *System,* including all tributaries. This does, however, raise the question of administration. We submit this does not mean that

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[35]Pro. Act, Section 8(a), Pg. 389 M.R.

[36]See Sec. 14 Palo Verde Contract as typical of Cal. contracts, M.R. Pg. 431. See Sec. 14 Nev. Contract, Pg. 414 M.R. See Sec. 13 Ariz. Contract, Pg. 406 M.R.

[37]M.R. Pg. 393.

[38]M.R. Pg. 173-174 last sentence bottom Pg. 173.

[39]Last paragraph Pg. 240 M.R.

[40]M.R. Pg. 395.

the United States may go into a state and control the place, quantity and priority of use intrastate at the will of the United States, as the United States contends with respect to its position in Nevada[41] and elsewhere. Congress has decided to the contrary as to the United States powers by providing that the United States is bound by the Compact notwithstanding anything contained in the Project Act[42] and providing for state regulation of appropriation and use of water within a state.[43]

Administration of the Compact in Harmony With Project Act:

The administration sounds complicated. In fact, we submit it is not as complicated as would be the Master's formula which sounds simple but, we urge, is not. His formula is predicated on a combination of "present perfected rights"[44] and pro ration[45]. To complicate the matter he decrees that the first 7,500,000 acre feet per annum in the segmented "main stream" under the Project Act[46] is subject to disposition under the Project Act and Secretarial contracts in the full Compact quantity from the "main stream" only. It is submitted this is in direct conflict with the controlling effect of the Compact provided in the Project Act, and contrary to the express requirements of the Compact that the first 7,500,000 a.f. per a. is *System* and shall satisfy

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[41]U.S. Op. Br. Pgs. 5, 23, 36, 39.

[42]Section 8(a) Pro. Act, Pg. 389 M.R.

[43]Section 18 Pro. Act, Pg. 395 M.R.

[44]M.R. bottom of Pg. 152 and Pgs. 234, 347-349, 359.

[45]M.R. Pg. 233.

[46]First and second paragraph of Section 4(a) of Project Act which the Master says gives of the *Article III(a) Compact water* 4.4 to Cal., .3 to Nev. and 2.8 to Arizona.

existing rights. Also because the Master's formula, after allocating 7,500,000 a.f. per a. from the "main stream" in effect allocates without pro tanto charge the tributary uses and uses on the main stream above Lake Mead. How any administration could be had under this conflicting set of factors we submit is beyond determination. Yet the Compact, we submit, cannot be and was not intended to be ignored even in the passage of the Project Act. If so, what is the meaning of the several above provisions of the Project Act making the Compact controlling?

It is submitted that the only feasible way to administer the matters involved in this case is to start with the Compact. Then apply the Project Act subject to the Compact. Such an accounting is inevitable in the end. Any piecemeal disposition of the matter in this case only evades the ultimate. You just can't, we claim, dispose of a part of the main stream and leave all other uses out and ever conform interbasin or interstate to the Compact. The Master does it by ruling the Compact irrelevant and this without reference to the provisions of the Project Act making the Compact controlling.[47]

Project Act

The Master holds the Project Act to be controlling over the Compact but only as to the "main stream" from Lake Mead and below.[1] The Compact which he holds applies to the System and includes the tribu-

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[47]See infra Pgs. 39-48, 52 for an outline and formula for the Decree in this case, which formula, we submit, harmonizes the Compact and Project Act and defines the rights of all Lower Basin states.

[1]M.R. Pg. 151.

taries,[2] is held to be irrelevant.[3] This is done upon the basis that the Compact deals only interbasin.[4]

A significant holding is that the Compact is only applicable to the extent made applicable by Statute (presumably Project Act) and contracts.[5] Then it is held that the Project Act is the source of authority—not for allocation of System uses in the Lower Basin—but only from the segment of the main stream water from Lake Mead and below.[6] On this theory the Master holds that pro tanto charges for uses above Lake Mead are void.[7] By implication and omission in the Arizona Contract the uses on the Gila River are excluded from pro tanto charge of Compact uses.[8] It is then held that the Project Act by Section 4(a) second paragraph furnishes authority for Arizona to have the Gila uses without pro tanto charge therefor, and in addition thereto its alleged full quota from main stream sources.[9]

Here we clash with the Report. The Master holds Section 4(a) second paragraph[10] and Section 5[11] to be the guiding source of authority for the contracts, and the Arizona contract in particular.[12] The Arizona contract is held valid, except for pro tanto charges for Arizona uses above Lake Mead.[13] Arizona contends

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[2]M.R. Pg. 142.
[3]M.R. Pg. 138.
[4]M.R. Pg. 139.
[5]M.R. bottom Pg. 141.
[6]M.R. Pg. 151.
[7]M.R. Pg. 227.
[8]M.R. Pg. 232.
[9]M.R. Pg. 179.
[10]M.R. Pgs. 382-383.
[11]M.R. Pgs. 384-387.
[12]M.R. Pgs. 171 and 151.
[13]M.R. Pg. 201.

that other provisions of her contract recognizing the right of Nevada, Utah and New Mexico to specified uses of water are also invalid.[14]

Arizona Contract Invalid as Interpreted:

We contend that the Arizona Contract as interpreted is invalid for the reasons that it is contrary to and in conflict and violation of the Compact and also in violation of the Project Act. That the Project Act requires contracts under the Project Act to be subject to and controlled by the Compact notwithstanding anything to the contrary in the Project Act.[1] This relates specifically to the Project Act works.[1] All contracts are required to be conditioned on their being subject to and controlled by the Compact.[1] Arizona's contract is so conditioned.[2]

As the Project Act, and in particular the second paragraph of Section 4(a) thereof, are claimed by Arizona to be the mandatory basis of its contract[3] and the Master holds it to be at least a guide,[4] may we turn to the Arizona Contract for some of its terms. Section 7 thereof deals with the quantities of beneficial consumptive uses of water Arizona is to have.[5] It is to be noted that the use Section 7(a) of Arizona's Contract purports to allocate to the extent of 2,800,000 acre feet of use per annum is not by the contract identified except to specify "from storage in Lake Mead—" thus main stream as segmented. Now may we turn to

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[14]Ariz. Op. Br. Pg. 29.
[1]Sec. 8(a) Pro. Act, Pg. 389 M.R.
[2]Sec. 13 Ariz. Contract. See Pg. 406 M.R.
[3]Ariz. Op. Br. Pg. 83, Ariz. Rp. Br. Pg. 88.
[4]M.R. Pg. 163.
[5]M.R. Pgs. 400-403.

the language of the second paragraph of Section 4(a) of the Project, said to be the source of giving Arizona 2,800,000 a.f. per a. out of the main stream as segmented *plus* non pro tanto charge of uses above Lake Mead or from tributaries, i.e., System uses. There we find that the language of the Act is not to give Arizona 2,800,000 a.f. per a. of a segment of main stream uses, or just any uses, but on the contrary 2,800,000 a.f. per a. of that 7,500,000 a.f. per a. of System uses of water apportioned by Article III(a) of the Compact.[6] The III(a) uses are *System*—not simply or confined to a segment of the main stream—and are clearly and unequivocally defined as such in Articles II(a) and III(a) of the Compact.[7]

Not only is the Arizona Contract in violation of the Article III(a) aspects as expressed in the second paragraph of Section 4(a) of the Act as well as Article II(a) of the Compact, but it is in conflict with and violates another provision of the Compact incorporated into the Act by reference. The beneficial consumptive uses allocated in perpetuity to the Lower Basin of the first 7,500,000 a.f. per a. are to include all water necessary to supply any rights "which may now exist" in the Lower Basin. As III(a) is System and not main stream or a segment thereof, we submit there is no basis for allocating all of that 7,500,000 a.f. per a. out of the main stream.[7a] That any beneficial con-

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[6]M.R. bottom Pg. 382 and top Pg. 383.

[7]M.R. Pgs. 372-373.

[7a]The Master's formula is 4.4 to Cal., .3 to Nev. and 2.8 to Arizona out of III(a)—all from Lake Mead only. While the contract language does not identify these items as III(a) the authority for the allocation of this 7.5 is of III(a). See both paragraphs of Section 4(a) of Act, Pgs. 382-383, M.R.

sumptive uses of water in the Lower Basin by Arizona from any part of the *System* must be charged pro tanto as a part of any 2,800,000 a.f. per a. to Arizona of III(a) uses.

Turning now to paragraph 7(b) of the Arizona Contract,[8] this provides for Arizona to have one-half of the excess or surplus unapportioned by the Compact—less such thereof as may be of right in Nevada, New Mexico and Utah. Here again the source is Lake Mead storage. Arizona says the Secretary had no right to recognize any rights of Nevada, Utah or New Mexico to any part of said excess or surplus.[9]

Going back to the said second paragraph in the Project Act, the authority there is—(if we are to consider something that never came into being)—for Arizona to have one-half of the excess or surplus unapportioned by the Compact.[10] In the language of this subparagraph of Section 4(a), it is obvious, we think, that the excess and surplus referred to includes use available to the Lower Basin above the III(a) uses. We can find no other waters referred to there as to these first two items other than III(a) and surplus and excess. Here again we refer back to the Compact and the other or additional 1,000,000 a.f. per a. of uses of which the Lower Basin may make use by Article III(b) of the Compact.[11] The uses there referred to are of *such* waters, referring back to System uses specified in Article III(a). The Master holds this to be

[8]M.R. Pg. 401.
[9]Ariz. Op. Br. Pg. 29, Ariz. Rp. Br. Pg. 88.
[10]M.R. top Pg. 383.
[11]M.R. Pg. 373.

so.[12] Thus to the extent of 1,000,000 a.f. per a. of excess or surplus in the second item of Arizona's Contract,[13] any part thereof confined and limited to the segment of the main stream—i.e, Lake Mead—is under the language of the Arizona Contract, void as contra to the Project Act and contrary to the Compact. The contract, as to surplus or excess, allocates such to Arizona—not from the System, where it is under the Compact and the Project Act (by its reference to the Compact)—but from Lake Mead.

To make matters worse, the Master by his allocation scheme, said to be authorized by the Project Act and implemented by the Secretarial contracts,[14] allocates all 7,500,000 a.f. per a. of III(a) uses plus both halves of all surplus or excess however defined—*out of Lake Mead*. This by his own definition includes the III(b) uses. Therefore, the Master's formula disposes of the total of at least 8,500,000 a.f. per a. of Compact uses —the total available to the Lower Basin from the *System* by Articles III(a) and (b) of the Compact but *not* from the *System*—but from *Lake Mead*. In addition, the Master's formula allows all tributary uses,[15] including the Gila, without pro tanto charge against the 8,500,000 of uses. This completely defeats the Compact by allocating 100% of the Compact III(a) and (b) from the main stream and treating other uses from tributaries as available over and above and free from accounting to the Upper Basin and this not *accountable* as to Mexican Treaty waters.

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[12]M.R. Pgs. 172, 194.

[13]Section 7(b) Pg. 401 M.R.

[14]M.R. Pgs. 138, 151, 153.

[15]Except for unexplained reasons—the Bill Williams. M.R. Pg. 184.

This, we submit, demonstrates the utter impossibility of any administration except by administration of the Colorado River System. It nullifies the Compact and its administration. We submit you just can't have any such accountings now or later because the necessary factors cannot be harmonized at all.

Here we again refer to the above material in reference to the Compact being controlling.[16] If the rights under the Project Act do not have to be harmonized with and be subject to and controlled by the Compact —then what—we ask, is the meaning of the several provisions of the Project Act and of the contracts so providing?[17] Also, it is to be noted that if the Tri-State Compact,—preratified by Congress as provided in the second paragraph of Section 4(a) of the Project Act—had been agreed upon by the three states, it would have had to have been upon the condition that such a Tri-State Compact had to be "in all particulars" subject to the provision of the Colorado River Compact and Arizona would have had to ratify the Colorado River Compact.[18] This coupled with the fact that the second paragraph of said Section 4(a) as to items (1) and (2) (2.8 plus excess) refer to Compact uses, i.e., System uses, we submit demonstrates that the Arizona Contract and the Master's main stream formula are unsound and unsupported and the Arizona Contract is void as interpreted by the Master.

This is not to say that Arizona might not be entitled to 2,800,000 a.f. per a. of III(a) uses and one-

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[16]See Pg. 18 supra.

[17]See Sections 8(a), 13(b),(c) and (d) of the Project Act.

[18]See items 6 and 7 of said second paragraph of Sec. 4(a) at Pg. 383 M.R.

half the excess or surplus, and Nevada 300,000 a.f. per a. subject to the rights of Utah and New Mexico from *System* uses available to the Lower Basin but *not* from the *main stream alone* with tributary uses added.

If the concept behind the formula of the Master be; that by allocating 100% of the III(a) water from Lake Mead and allocating 100% of surplus and excess from Lake Mead and allowing all tributary and other uses as plus 100%, it can be done by depending upon there being physically available in the main stream below Lee Ferry unused portions of Article III(a) uses apportioned to the Upper Basin in perpetuity—then we submit there are unsurmountable legal obstacles.

First is the matter of the Master's designation of the main stream from Lee Ferry to Lake Mead—265 miles—as a tributary and uses therefrom not to be deductible pro tanto from the allocated Lake Mead amounts.[19] A holding herein that would become res adjudicata would wreck the whole concept of the Compact as well as the Project Act.

To decide that the Arizona Contract for water from Lake Mead may be *permanently* attached to unused water apportioned in perpetuity to the Upper Basin to satisfy Lower Basin III(a) or (b) uses encounters several legal obstacles.

One is that Section 5 of the Project Act provides that the Secretarial contracts shall be *for permanent service.*[20] How can a supply that has been allocated "in perpetuity" to the Upper Basin be made the subject of permanent service to a Lower Basin state?

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[19]M.R. Pg. 226.

[20]See Pgs. 384-385 M.R. last sentence beginning on Pg. 384.

Secondly, to assume the inability of Upper Basin states to develop projects including transmountain diversions sufficient to put to use the full perpetual allocation of the Upper Basin is unsound as a practical matter and no basis for the legal assumption of availability to the Lower Basin on a permanent basis.

Thirdly, if there are quantities of the Upper Basin allocation of 7,500,000 a.f. per a. physically present at Lee Ferry because unused in the Upper Basin, its very presence would preclude calling on the Upper Basin for water for Mexico and the Upper Basin could, and undoubtedly would, require its application to Mexico. In so doing there seems to be no answer to the proposition that in such an accounting all Lower Basin System uses would have to be accounted for. In this accounting we submit California is not required to sit by and have only main stream uses by other states accounted for before the California uses are to be burdened. We submit California would be entitled to have Arizona charged for all her tributary uses as well as her main stream uses as a part of the 8,500,000 a.f. per a. that are available and chargeable to the Lower Basin before demand can be made on the Upper Basin. Being in the Lower Basin as surplus already, we submit the Upper Basin could require this surplus contribution to Lake Mead to be used for Treaty purposes. Thus, we claim, it would not be available in the Lower Basin for permanent service to Arizona. Therefore, at least interbasin—and we submit between states in the Lower Basin—this 2,800,000 a.f. per a. allocated by the Master to Arizona from the "main stream" would be subject to the Mexican Treaty obligation at least to the extent of Arizona's uses on the Gila. Arizona's rights

to main stream uses would also be subject to such diminution—because of her Gila uses—to the extent of other Lower Basin states' rights to main stream water. Therefore, we say that there could be nothing legally firm or permanent or justified in awarding Arizona her alleged full share of System water out of the main stream, whether or not dependent upon conjectured and unfirm use of Upper Basin water. Also because, we submit, you just cannot give Arizona 100% of her alleged share of System water out of the main stream and also give her unaccounted for uses out of the Gila and much less above Lake Mead, or in defiance of the use rights of other Lower Basin states.

The Gila Under the Project Act:

We submit that under the Compact there is no room for argument against the Compact including all the tributaries, including the Gila, as System. That the 8,500,000 a.f. per a. of uses avialable to the Lower Basin is of System water. The Master so holds.[1]

Arizona insists that the Project Act, second paragraph of Section 4(a), gives to Arizona the exclusive use of the Gila. Also, gives protection against Arizona being required to release any of the waters of the Gila System for use in Mexico.[2] Arizona also interprets this language as giving the Gila System uses to Arizona free from any quantitative accounting or pro tanto charge against her share of System water uses available under the Compact.[3] There is no question but that Arizona sought by every device from 1922 through 1929

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[1]M.R. Pgs. 142-143.

[2]Items (3) and (4) Section 4(a), second paragraph M.R. Pg. 383.

[3]Ariz. Rp. Br. Pg. 78.

to get the Gila uses exclusively for Arizona, and out from under the Compact. Arizona's briefs and citations show diligent efforts and skillful maneuvering to this end. On the other hand, the opponents to this were equally as adamant that the Gila River be included along with all other tributaries as a part of the System and its uses accountable as a part of the System. Wishing to avoid repetition, we here refer to the material at Pages 91-96, 99-100 of California's Reply Brief. To us the many arguments pro and con before ratification of the Compact and before passage of the Project Act demonstrate that the issue was strenuously debated. To us it also demonstrates that if there had been any intent to amend the Compact to exclude the Gila System, or any tributaries, from the Colorado River System, the matter was so prominently before Congress that it could and would have been expressed by amendment of the Compact. Two express amendments were made to the Compact.[4] We therefore submit that as the Project Act specifically makes the Compact controlling[5] and it was not specifically amended in respect to System, then that is decisive.

But Arizona says the Project Act amended or modified the Compact in this regard.[6] Much legislative history is quoted by all parties hereto. The United States makes a timely observation. "In debates of such duration, participated in by many individuals, representing competing interests, it is inevitable that many argu-

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[4]One related to the navigability of the Colorado. See Art. 4(a) Compact, and Sections 1 and 6 of Project Act. The other related to six state ratification of the Compact. See Article XI Compact and Section 13(a) Project Act.

[5]See Pgs. 18-19.

[6]Ariz. Op. Br. Pg. 27.

ments were advanced and statements of intention made which confuse the picture."[7] We therefore merely cite the record to show that if there had been any intention to eliminate the Gila from System or System accounting it could have been expressly done. We submit it was not done either as to the Compact or Project Act.

As to the effect of the second paragraph of Section 4(a) of the Project Act and with particular reference to the Gila River, we submit the following. The United States expresses the matter aptly. The above mentioned paragraph of Section 4(a) was a way out of a possible impasse. It merely offered to Arizona, Nevada and California an opportunity to make a Compact. The Compact was never made. No such agreement was ever made. We do not believe it necessary to resolve any precise meaning to items (3) and (4) of said second paragraph of Section 4(a).[8] By her series of reservoirs of eleven or more on the Gila System[9] Arizona has successfully and completely cut off any flow of the Gila into the Colorado and is putting it fully to use in Arizona. The Arizona and New Mexico Gila System uses are now far upstream on the Gila and remote from the Colorado, and it is physically very unlikely that any interest would advocate or be able to release from Arizona reservoirs water so as to make it available to Mexico near Yuma. Therefore, Arizona has really accomplished what we believe to be the suggestion in 4(a) aforesaid.

However, we submit that it was never the intention of the Upper Basin states, much less the Lower Basin

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[7]U.S. Rp. Br. Pg. 38.
[8]M.R. Pg. 383.
[9]M.R. Pgs. 39-43.

states, to give Arizona the use of the Gila as being unaccounted for. Even if so, it was never done by Compact or agreement. To carve the Gila System out of the Colorado River System, accounting-wise, and give it to her in addition to a full allotment of all her claims to her alleged share of System water is too big a jump, we contend.

The Master holds and Arizona, naturally, agrees that the Secretarial contract affects this non-accounting for Gila uses because there is no reference to accounting or pro tanto reduction of Arizona's Gila uses.[10] This, we submit, fails of its own weight. The Master says the Project Act does not cover the Gila[11] and only the Project Act and contracts are held to be controlling.[12] It is hard, then, to see how the Project Act could eliminate Compact accounting on the Gila if the Project Act did not deal with the Gila and the failure in the Contract to exclude the Gila, amounting to exclusion from Compact accounting, is negatived by the provisions of Sections 7(c) and 13 of the Arizona Contract unequivocally making the Compact controlling.[13]

Under the Pleadings and Evidence:

It is submitted that it is very significant that following 1929 ratification of the Compact and passage of the Project Act, Arizona did continue to try to eliminate being charged for Gila uses. If the Compact or Project Act notoriously settled the issue as now

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[10]See Section 7(d) of Arizona Contract, M.R. Pg. 401. Master's holding Pg. 232 of Report.

[11]M.R. Pg. 232.

[12]M.R. Pg. 138.

[13]M.R. Pgs. 401 and 406.

claimed by Arizona, there would have been no need for Arizona's subsequent conduct.

Having tried unsuccessfully to eliminate the Gila from accounting by Tri-State Compact, Arizona next resorted to the claim that at least one million a.f. per a. of Compact uses (i.e., III(b)) were subject only to Arizona Gila use under the Compact and Project Act and contracts made by the Secretary were infringing upon this right.[14] This Court held there was no merit to Arizona's claim that III(b) water related only to the Gila or was exclusively for Arizona.[15]

And may we now call attention to the pleadings herein and the trial record herein. We submit this is important. The contentions of Arizona, now made, that the Gila had been eliminated from accounting in 1929 and was so understood is completely refuted by Arizona's own pleadings herein. Further, we submit that the pleadings herein and the years and volume of trial record herein were devoted, not to the issue argued by Arizona or contained in the Report, but to a complete disposition of the Compact as well as the Project Act, Limitation Act and contract issues herein. The pleadings and trial were devoted to the issues of the rights and uses of Nevada and Utah on their respective tributaries, as well as Nevada's main stream claims. The pleadings and trial also covered in detail the New Mexico tributaries rights and uses. They also covered in detail the rights and uses of Arizona on the Gila and the main stream. It also covered the California claims to

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[14]Arizona vs. California, 292 U.S. 341 at 349, 350-351; 78 L.Ed. 1298 at 1301, 1302 (1933).

[15]Arizona vs. California, 292 U.S. 341 at 358; 78 L.Ed. 1298 at 1306.

rights and uses on the main stream. As we are here discussing primarily the Gila, we will document the issues in the pleadings and the evidence under a separate heading.[16]

The next effort of Arizona to eliminate the Gila from System accounting was in this case. It was based on the concept of gaining, without accounting therefor, about one million a.f. per a. on the Gila by this process. Regardless of the amount actually put to beneficial consumptive use on the Gila, Arizona urged that she should only be charged or have to account for the diminution to the flow of the main stream by the action of man on the Gila. Even though Arizona at various times claimed her Gila uses to be about 3,000,000 a.f. pe a.,[17] she claimed the "reconstructed virgin flow into the Colorado from the Gila to be only about one million a.f. per a."[18] This claim she has now receded from and admits accounting for use should be based on beneficial consumptive use at places of use.[19]

As a part of Arizona's claims in her Complaint she stated her Gila uses but claimed she should only have to account therefor to the extent of her uses in excess of one million a.f. per a. This million measure was based on her main stream depletion theory.[20] She also alleged that her Gila uses were chargeable to III (b) uses and to III(a) uses only to the extent that III(a) uses exceeded the one million of III(b) uses.[21] Strange pleadings in 1952, it would seem, if it was so

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[16]See Pg. 38 infra.

[17]Arizona v. California, 283 U.S. 423 at 460.

[18]Ariz. Complt. Pg. 26, Ariz. Ans. to Cal. Ans., Pgs. 4, 16-17.

[19]Ariz. Op. Br. Pg. 105.

[20]See Pg. 26 Ariz. Complt., first paragraph.

[21]See top Pg. 17 Ariz. Answer to California Answer.

well known to Congress in 1929 and to Arizona at all times since then that the Gila was excluded from Compact or any accounting, or if the Project Act in 1929 accomplished giving the Gila to Arizona free from accounting. Nevada plead that the Gila uses were accountable as III(a) uses.[22] The United States refers to the Arizona Contract for its terms and alleges the United States is "in grave doubt" about whether the Arizona Contract covers tributaries and applies to the Gila and requests this Court to resolve the matter.[23] Weeks were spent in trying Arizona's rights and uses on the Gila and primarily on the issue of the extent of and how to measure them quantitatively.[24] New Mexico plead her rights and uses on the Gila River and its tributaries in New Mexico—many, many miles and the width of Arizona away from the main Colorado[25] and claimed she was entitled to and was of right using III(a) and III(b) uses.[26] Her whole case on the trial was devoted to her detailed uses in New Mexico from the Gila System.

Again, we say these are strange pleadings and trial proceedings if the Gila had been eliminated. Also, may we ask this question. If only the main stream of the Colorado from Lake Mead and below are involved in this case and tributaries, including the Gila, are not involved in this case, and the Project Act is controlling and the

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[22]See Pg. 18, Nevada Complt.

[23]See Pgs. 36-37 U.S. Complt. in Intervention.

[24]Ariz. Exs. 77, 77A-E, Tr. 325, 3851, 3988. Ariz. Exs. 100-103 re water rights on Gila, Tr. 379-380. Ariz. Exs. 107-120 Tr. 408-418, Ariz. Exs. 128-134, Tr. 800-1017; Exs. 137 Tr. 1206-.....; Ex. 162 Tr. 2013 and many others. See Tr. Pgs. 1326-2194, 2647-3650 re testimony in this.

[25]See Pgs. 4-6, N.M. Appearance and Statement of Claim.

[26]Also see Pg. 7, N.M. Appearance and Claim.

Compact is irrelevant—then why any decision on the Gila either in Arizona or New Mexico, and where does jurisdiction therefor come from? We submit that the Gila and all tributaries are involved in this case and that the case was plead and tried on that basis and should be so decided.

The Compact, Project Act, Limitation Act and Contracts Harmonized

We herewith submit our contentions that the Compact, Project Act and Limitation Act can be and must be harmonized to enable any administration of the Colorado River System in the Lower Basin and in both Basins. We also submit that the contracts can all be sustained under the interpretations we offer. We further submit that the following was and is contemplated in the drafting and ratification of the Compact, the passage of the Project Act, the enactment of the Limitation Act and in the drafting of the contracts.

Application of the Compact:

We contend that the Compact contemplated and provided in Article III(a) for two things. One was that the beneficial consumptive uses to be perpetually available to the Lower Basin to the extent of the use of the first 7,500,000 a.f. per a. were to be of System—not merely a part thereof. That by providing that that amount of beneficial consumptive use should "include all water necessary for the supply of any rights which may now exist," each Lower Basin state was and is entitled to have its then existing uses served from said amount of uses. The Master has held, and we agree, that the operative date is June 25, 1929[1] when the

[1]See M.R. Pg. 152 and footnote 20.

Compact became effective by ratification by the United States and Proclamation of the President. This right to use of the first 7,500,000 a.f. per a. of such uses we claim had as reciprocal thereto the obligation to account anywhere on the System for existing uses in the Lower Basin.

To demonstrate this concept, we beg the indulgence of this Court for an analysis of the issues in the pleadings, the evidence and record in support of the proposition that this case as plead and tried was a System—not main stream matter. We wish to demonstrate that as a practical as well as legal matter the case can and in fact must be disposed of on a System and not main stream basis. Also, that Compact accounting, practically and legally, is not only possible but required. We beg indulgence to show in some detail that the rights of all Lower Basin states are not only before this Court but what their rights are and how administration can best be had by Decree herein.

Reference to the pleadings and record as to each Lower Basin states rights of use as established in the case follows. We will make it as concise as possible. We feel it important to the overall determinations to be made herein.

We do not contend that the following details are all the evidence, but we do contend that the following is substantially the picture and furnishes a basis and pattern for disposition of this case.

As to Utah:

We submit Utah was entitled to protection for her then existing rights as of 1929 on her tributaries in the Lower Basin. She plead her claims of right on

her tributaries, *i.e.*, on the Virgin River and adjacent areas and on Kanab and Johnson Creeks. She claimed existing rights to 65,625 plus 15,173 a.f. per a. for 22,857 plus 5,338 acres; also asked for 70,852 a.f. per a. for new future uses.[2] Utah proved that her existing uses were initiated and established in the early Mormon days in 1847[3] and 1870.[4] A map of the irrigated areas was introduced.[5] A 1902 detailed study of these uses showing ditches used and areas served was received.[6] A series of Decrees adjudicating priorities prior to 1929 are in evidence.[7] Evidence as to acreages, names of appropriators and descriptions of properties served were introduced.[8] Thus Utah plead and proved very old uses, *i.e.*, III(a) uses, and asked for recognition for future needs from surplus.[9] The established Utah appropriations and existing uses are as follows: From Virgin River, 48,750 a.f. per a.; Johnson and Kanab Creeks, 6,850 a.f. per a. (Vol. II, Cal. Findings, pgs. XVII-1-10). Summarized to rounded figures of 56,000 a.f. per a. (Vol. I, Cal. Findings, pg. IV-55), recapped pg. VII-14.[9a] See Master's Report, pg. 97.

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[2]See Utah Complaint and Answer in Intervention, Pgs. 2-3.

[3]Tr. 17827.

[4]Tr. 17829.

[5]Utah Ex. 1, Tr. 17811-17823.

[6]Utah Ex. 2, Tr. 17830.

[7]Utah Ex. 9-18, inc., Tr. 17871.

[8]Utah Exs. 20, 21 and 22, Tr. 17878, 17883, 17885.

[9]See Utah Complt., Pgs. 3, 6.

[9a]These references to proposed California Findings are cited also for their references to the supporting material in the transcript and trial exhibits as cited.

As to Nevada:

Nevada alleged a right to 539,100 a.f. per a. of III(a) uses.[10] She alleged in detail her existing rights and future claims on her tributaries on the Virgin and Muddy Rivers and Meadow Valley Wash. Her total tributary "existing" uses were plead as 48,340 a.f. per a.[11] and she prayed that her use rights be decreed to be of III(a) and to have a right in the future to share in surplus.[12] The tributary uses were established to be very early ones, some dating back to Mormon colonization dates in 1865.[13] Evidence of early appropriation was introduced on the Virgin River showing pre-1905 rights and priorities.[14] The Meadow Valley Wash rights stemming from 1864[17] were evidenced by priority tables, legal descriptions, permits for a total acreage of 1,790 acres.[18] The established Nevada appropriations and existing uses are as follows: Virgin River System, including Muddy River and Meadow Valley Wash, 51,000 a.f. per a. (Vol. II, Cal. Findings, pgs. XV-1-16; Vol. I, Cal. Findings, pg. IV-55, Finding 4F-102, recapped at pg. VII-14). Nevada's main stream uses are all post-1929 See Master's Report, pg. 71 concerning Nevada uses.

As to New Mexico:

New Mexico plead uses for 20,900 acres i.e. 9,500 on the Little Colorado and 11,400 acres on the Gila—

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[10]See Nev. Petition in Intervention, Pg. 10.

[11]See Nev. Pet. Pg. 12.

[12]See paragraphs 2 and 4 of prayer, Nev. Pet. Pg. 25.

[13]Tr. 16241.

[14]Nev. Ex. 7, Tr. 16222.

[17]Tr. 16257.

[18]Nev. Ex. 17, Tr. 16258.

all in New Mexico—as existing uses and rights,[21] as III(a) and (b) uses,[22] and claims to surplus.[23] The evidence presented was extensive and included some 3,000 pages of deposition[24] a stipulation concerning documents[25] and a series of maps.[26] The New Mexico contest was really one between New Mexico on the one hand and Arizona's conflicting claims and the claims of the United States for Indian and Federal uses.[27] The established appropriations and existing uses are as follows: On the Gila System, including San Francisco and San Simon Creeks, 34,650 a.f. per a. (Vol. II, Cal. Findings, pgs. XVI-3-9-16A-101.) This is rounded to 35,000 a.f. per a. in the California recap on tributaries (Vol. I, Cal. Findings, pg. VII-14, Item 71-201). Of this, the Master has allowed New Mexico not to exceed 28,227 a.f. per a. as herein indicated. This deduction of 6,423 a.f. per a. from New Mexico's uses are then to be added to Arizona's uses. A compromise as to the Gila uses in New Mexico was arrived at and is adopted by the Master in upholding New Mexico's claims.[28] Article IV Page 354 and VII Page 359 of the Master's proposed Decree set forth the uses New Mexico may make and may not make. They are: From San Simon for 2,900 acres, not to exceed 8,220 a.f. per a.; from San Francisco Creek for 2,269 acres, not to exceed 4,112 a.f.

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[21]N. M. Appearance and Statement, Par. VII, Pgs. 4-5.
[22]N. M. Appearance, Pgs. 6, 8.
[23]N. M. Appearance, Pg. 8.
[24]Tr. 17249, L. 15.
[25]Tr. 17251, L. 13.
[26]N. M. Exs. 402A-402H, Tr. 17286-17298.
[27]M. R. Pg. 325.
[28]See Master's holding R. Pg. 324—Also M.R. Pgs. 329, 330.

per a.; and from the Gila proper not to exceed, for 7,057 acres, 15,895 a.f. per a.[29] New Mexico is annually to report the acreages irrigated in accordance with Article IV of the proposed Decree.[30] Neither New Mexico, the United States nor Arizona has excepted from this. See Page 76 for Master's Report on New Mexico uses.

The New Mexico uses on the Little Colorado are established as 10,500 a.f. per a. (Vol. II, Cal. Findings, pg. XVI-6-8, Item 16B-201, summarized in Vol. I, Cal. Findings, pg. IV-55, Item 4F-102, recapped in Vol. I, pg. VII-14, Item 7I-201, Cal. Findings).

This makes a total of tributary uses for New Mexico of 45,500 a.f. per a. (Vol. I, Cal. Findings, pg. VII-14, Item 7I-201). Adjusted to the Master's limitation for New Mexico on the Gila System to 28,227 a.f. per a., this reduces New Mexico's tributary rights and uses by 6,423 a.f. per a. as against New Mexico's proof. Adjusted to the round figures of the Cal. Findings (35,000 a.f. per a. for the proof of 34,650 a.f. per a.), New Mexico's tributary rights and charges are fixed at 45,500 a.f. per a. minus 6,423 a.f. per a. or a total of 39,079 a.f. per a. See Master's Report, pg. 76.

As to Arizona:

Despite lengthy pleadings and a protracted trial over the rights of Arizona on the Gila from the standpoint of the uses being very early ones, and particularly on the measure of Arizona's uses, the matter has become comparatively simple. Arizona now concedes the correctness of the Master's ruling that uses are to be

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[29]M. R. Pgs. 354-355.
[30]M. R. VII, Pg. 359.

based on beneficial consumptive use at the places of use.[31] The problem of accounting for the measure of Arizona's beneficial consumptive uses on the Gila System has been made simple by studies and evidence as to the safe annual yield there. These studies show that the safe annual yield of the Gila Basin is approximately 1,844,000 af. per a.,[32] as against Arizona's actual uses in excess thereof.[33] California has suggested that in accounting for Gila uses by Arizona this figure for safety be 1,750,000 a.f. per a. of continuous beneficial consumptive uses.[34]

Arizona's tributary uses on the Gila, Little Colorado, Kanab Creek, Virgin River, Bill Williams and miscellaneous tributaries are set forth in detail in Vol, II, Cal. Findings, pgs. XIV-57-103, Items 14G-101-14L-201. These, exclusive of the Gila River System, total 82,500 a.f. per a. (Vol. I, Cal. Findings, pgs. 14-54-55, Items 4F 101-102). The Gila River System uses and rights are given in detail. (Vol. II, Cal. Findings, pgs. XIV-57-75, Items 14G-101-204). The safe annual yield of the Gila System is there calculated at 1,715,000 a.f. per a. (Vol. I, Cal. Findings, pg. IV-54). Recapped, the total Arizona tributary claims and uses, including the Gila River Systems, is 1,797,500 a.f. per a. on a safe yield basis (on the Gila). (Vol. I, pg. VII-14, Item 7I-201, Cal. Findings.) To this figure of 1,797,500 a.f. per a. must now be added 6,423 a.f. per a. taken from New Mexico, thus enlarg-

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[31]Measure, M.R. Pg. 186, Arizona position, Ariz. Op. Br. Pg. 105.

[32]Cal. Exs. 1513, 1513A, Tr. 10,477 et seq.

[33]Cal. Ex. 1514A, Column 5.

[34]See Page V-35, Vol. I, Cal. Findings and Conclusions for details.

ing Arizona's Gila uses. This makes Arizona's total tributary uses 1,803,923 a.f. per a.

As to the United States:

The Master holds that rights to use and uses of main stream water by the United States are to be charged to the share of the state in which it is used.[35] As there is no other source there appears to be no argument. The United States presented all of its claims of rights and uses in extreme detail. The Master sets out each claim in detail, commencing at Page 80 of his Report. These claims are largely, sofar as number is concerned, off the main stream but include all main stream claims.[36] These claims are made the subject of holdings by the Master[37] as well as Findings as to acreages and quantities of water.[38] It is to be noted that quantitatively the Master fixes the uses as per this example, *i.e.*, 51,616 acre feet of annual diversions or a quantity—necessary to supply the consumptive use required for irrigation of 7,743 acres—*whichever is less.*[39]

As to Main Stream:

By the provisions of the first paragraph of Section 4(a) of the Project Act[40] and the provisions of the California Limitation Act[41] California is limited to beneficial consumptive use at points in California of 4,400,000 a.f. per a. of the first 7,500,000 a.f. per a. of such uses available to the Lower Basin plus one-half

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[35]M.R. Pg. 247.
[36]M.R. Pgs. 80-96.
[37]M.R. Pgs. 254-266.
[38]M.R. Pgs. 267-304.
[39]M.R. Pg. 269.
[40]M.R. Pg. 382.
[41]M.R. Pgs. 397-398.

of any excess or surplus unapportioned by the Compact. The two provisions specifically define the 4,400,000 a.f. per a. as III(a) uses.[42]

The second paragraph of Section 4(a) of the Project Act, for whatever influence it may have, authorized a Tri-State Compact that would have given Nevada and Arizona, respectively, *from* the 7,500,000 of III(a) uses, i.e., *System*, 300,000 to Nevada and 2,800,000 to Arizona, and Arizona the other half of any excess or surplus not apportioned by the Compact. As above discussed, we claim it did not purport to give these quantities to Nevada or Arizona solely from the main stream but from the System.[43]

All of the immediate foregoing is to bring into focus the case as plead and tried; also to give the data for a formula for a Decree we propose in place of the Master's proposed Decree.

We submit that the Compact in making the first 7,500,000 a.f. per a. of beneficial consumptive uses available to the Lower Basin from the System—to include "all water necessary for the supply of any rights which now exist"[44] meant this.

That, as of the effective date of the Compact, the following states were entitled to that part of the System water to which they had existing rights up to an aggregate of 7,500,000 a.f. per a.:

Utah's rights and uses from the Virgin River and Kanab and Johnson Creek, as above shown, are 56,000 a.f. per a.

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[42]See M.R. Pgs. 382, 397-398.

[43]See Pgs. 23-27 supra.

[44]Article III(a) Compact, M.R. Pg. 373.

Nevada's tributary rights and uses, as above indicated, are 51,000 a.f. per a.

New Mexico's rights and uses on the Gila System, allowed by the Master, are 28,227 a.f. per a., and her rights and uses on the Little Colorado are determined as 10,500 a.f. per a., making a total of Nevada's tributary uses of 38,727 a.f. per a.

Arizona's tributary uses on the Gila and Little Colorado Rivers, Kanab Creek, Virgin River and the Bill Williams and miscellaneous tributaries, increased by the deduction from New Mexico, makes Arizona's total tributary uses 1,803,923 a.f. per a.

California had whatever her existing rights were within this first 7,500,000 a.f. per a. of III(a) uses.

The foregoing demonstrates that of the first 7,500,000 a.f. per a. of System uses, consisting of existing right uses, 1,949,650 a.f. per a. were from that part of the System made up of tributaries, leaving 5,556,773 a.f. per a. for main stream existing use rights, if they totaled that much. By this process the provisions of Article III(a) of the Compact as to System and as to existing rights would be satisfied. There will, of course, be such additional quantities in the main stream as are there as a result of excess or surplus.

Application of the Project Act:

The Master holds the Compact irrelevant and the Project Act and contracts controlling.[47] We contend that the Project Act by its language harmonizes with the Compact instead of making the Compact irrelevant. We have already pointed out the provisions of

[47]M.R. Pg. 138.

the Project Act that make the Compact controlling, notwithstanding anything in the Project Act to the contrary.[48]

On both the questions of recognition of System as against main stream and on appropriative rights as "existing rights" may we turn to Sections 4(a) and 5 of the Project Act. These two Sections are said to make the Compact inapplicable and furnish the basis for its irrelevancy and authorize a main stream decision and nullify the law of appropriation or equitable apportionment. May we analyze this.

Section 5 says the contracts shall conform to Paragraph (a) of Section 4 of the Project Act. Turning to Section 4(a)—first paragraph—we find that after all the debates and contentions of Federal regimentation and the now contention that the Compact provisions as to System and existing rights are displaced by the Project Act that Congress perpetuated System and existing rights instead of displacing them. In this subsection we find that Congress provided and California agreed—"that the aggregate annual consumptive use (diversions less returns to the river) of water of and from the Colorado River for use in the State of California, including all uses under contracts made under the provisions of this Act and *all water necessary for the supply of any rights which may now exist* shall not exceed four million four hundred thousand acre feet of the waters *apportioned* to the Lower Basin states by paragraph (a) of Article III of the Colorado River *Compact,* plus not more than one-half of any excess or surplus waters unapportioned by said *Compact,* such

[48]Sections 8(a) and 13(b) and (c) Pro. Act. Also Pg. 18 supra.

uses *always to be subject to the terms of said Compact.*"[49]

It is submitted that the above emphasized language clearly indicates that the requirements of Section 5 that the Secretarial contracts conform to Section 4(a) plainly mean this. That the uses to be available to California under contract should *include*, among other things, *all water necessary for the supply of any rights which may now exist in* California—not to exceed, however, 4,400,000 plus half of the excess or surplus unapportioned by the Compact. Also, that with respect to the uses not to exceed 4.4, they are specifically earmarked and designated as III(a) uses, i.e., Compact uses—not main stream only. The fact that California could and can get water only out of the main steam does not militate against the obvious reference to System and existing rights in Compact and Project Act provisions. Also to be noted is that here again we have that constant and repeated Project Act reference back to the Compact as controlling—"such uses always to be subject to the terms of said Compact."[50] How, we asked, under this language could you divorce from Compact accounting interbasin or interstate the uses allowed to California?

Now, with reference to the second paragraph of Section 4(a), considered from the standpoint of conflict or harmony with the Compact, we have hereinbefore analyzed items (1) and (2), being the 2.8 and half of the surplus reference to Arizona, and .3 to Ne-

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[49]M.R. Pg. 382. Corresponding provisions of Limitation Act, M.R. Pg. 398.

[50]M.R. Pg. 382, end of paragraph on that page.

vada.[51] We again submit that it is too clear for words that the 2.8 to Arizona and .3 to Nevada are by specific language III(a) uses. Also, that surplus relates to III(b)—also Compact uses. Again there is to be noted that "all the provisions of said Tri-State Agreement shall be subject in all particulars to the provisions of the Colorado River Compact."[52] Again we say this recognized Compact System accounting and by the controlling effect of the Compact—existing rights as the basis of contract. Interbasin or interstate the System accounting is necessary and contemplated in our view.

Application of the Contracts:

If we consider the Compact as recognizing and perpetuating *"existing rights"* from III(a) System uses and the Project Act as following that pattern, we then have to consider the series of contracts to see if they are also in harmony with the administration of a Compact accounting interbasin and interstate.

California Contracts:

The California contracts, prior in time to the Nevada and Arizona Contracts, have a common provision in each. This provision, typified in the Palo Verde Contract[53] in items designated as "Sections" 1 through 12,[54] permits uses up to a total of 5,362,000 a.f. per a. at points in California. The contracts are silent on the question of III(a) or other Compact designations of the uses except to provide repeatedly that the Compact

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[51]See Pg. 27 supra.
[52]Item (6) M.R. Pg. 383.
[53]Ariz. Ex. 33, Tr. 249.
[54]M.R. Pgs. 425-429.

is controlling.[55] The preservation of present perfected rights is also recited.[56] However, as these contracts are made under the first paragraph of Section 4(a) of the Project Act and under Limitation Act the 5,362,000 a.f. per a. would have to be 4,400,000 from III(a) System existing right uses and the balance from half of the designated surplus, the first million of such uses being also System III(b) uses—interbasin and interstate.

So far as California is concerned, as of June 1929 it had long been recognized in the debates in Congress and elsewhere that the uses to be served in California under the Compact and Project Act included not only Palo Verde and Imperial Valleys, but Coachella Valley and the Metropolitan areas on the California Coast—this last to the extent of at least 1,000,000 a.f. per a. of uses.[57] Pre-1929 appropriations for the coastal area had been made and Metropolitan District bought and paid for the pre 1929 works and we submit succeeded to the pre 1929-rights.[58]

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[55]Palo Verde Contract, M.R. at Pg. 428 and Section 14 of Contract, M.R. Pg. 431.

[56]Palo Verde Contract, M.R. Pg. 428.

[57]See H.R. Rep. No. 918, 70th Cong., 1st Sess., pt. 1, at 20-21 (1928); also S. Rep. 592, 70th Cong., 1st Sess., pt. 1, at 24-25 (1928); also, Hayden in Cong. Rec. 70th Cong., 1st Sess. 464 (Dec. 12, 1928).

[58]The City of Los Angeles as early as 1924, and San Diego as early as 1926, filed applications to appropriate water for their coastal areas. See Cal. Ex. 419, Tr. 9395 and Ex. 436, Tr. 9395. Commencing in 1923 extensive work was done to implement these appropriations, Tr. 9451, and the work continued over nearly 10 years, Tr. 9467. Infiltration galleries for diversions were excavated, Tr. 9457-9459. Nearly two million dollars was so spent and when Metropolitan was organized to carry out this project, it acquired these benefits and efforts from Los Angeles, for which Metropolitan paid over two million dollars to Los Angeles, Tr. 9471. Thereafter Metropolitan financed and completed the present works as elsewhere detailed.

The Secretary called upon the California agencies to agree upon their appropriative priorities in time and quantity. This was done in the "Seven Party Agreement."[59] The Secretarial contracts with the California defendant agencies conformed in precise langauge. Of necessity the contracts, whether expressly saying so or not, had to recognize existing rights as required by the first paragraph of said Section 4(a). Recognizing the fact that all uses had to be accounted for, all California contracts had in the delivery obligation of the United States the pro tanto deduction provision "including all other waters diverted for use."[60]

Nevada Contracts:

As hereinbefore indicated, after the pre 1929 existing rights on tributaries in Utah, Nevada, New Mexico and Arizona had been protected as to existing rights to System uses, approximately 5,556,773 a.f. per a. of III(a) uses were available from the main stream,[61] first to satisfy existing rights and then any residue for other uses. The United States made contracts with Nevada for 300,000 a.f. per a.[62] Attention is called to the pattern that the contracts do not specify how much is III(a) or surplus. Article 5(a) of the contract conforms to the Compact accounting concept (we say recognized in the Project Act) by providing for pro tanto deduction from this 300,000 a.f. per a. for uses diverted by Nevada from the Colo-

[59]Ariz. Ex. 27, Tr. 242.

[60]Palo Verde Contract Section 6, M.R. Pg. 424.

[61]See Pg. 46 supra.

[62]Ariz. Exs. 43 and 44, Tr. 253. See M.R. Pgs. 409 and 419.

rado River System from tributaries above Lake Mead.[63] This we submit was and is in harmony with the Compact, the Project Act and interbasin and interstate accounting. In 1929 Nevada had no main stream uses.

The Arizona Contract:

The Arizona Contract does not designate the 2.8 a.f. per a. mentioned in Section 7(a) or the half of surplus mentioned in Section 7(b) of Arizona's Contract as being III(a) or III(b).[64] The second paragraph of said Section 4(a) of the Act does identify the uses as III(a) as to the first 7.5 of uses to the Lower Basin. We submit the contract must be so interpreted. Section 7(c) of the Arizona Contract recognizes the preference to "present perfected rights" and also incorporates the Compact by making the contract subject to and controlled by the Compact.[65] Section 7(d) of the contract follows the recognized System accounting pattern by imposing the pro tanto charge for existing or future Arizona uses above Lake Mead.[66] The Compact accounting requirements are further recognized in said contract—in that Arizona recognizes and agrees that New Mexico and Utah are entitled to share in the uses apportioned and unapportioned by the Compact.[67] Arizona also by her contract agrees to the right of the United States to contract with California agencies for uses, provided the contracts do not exceed 4.4 of III(a) uses and uses of one-half of the

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[63]"—to so much water, including all other waters diverted for use within the State of Nevada from the Colorado River System —", M.R. Pg. 420.

[64]See Pgs. 400-401, M.R.

[65]M.R. Pg. 401.

[66]M.R. Pg. 401.

[67]Section 7(g), M.R. Pg. 402.

"surplus".[68] The Contract also again agrees that the Compact is controlling.[69]

Now as to the interpretation of the Arizona Contract. The contract agrees to pro tanto charges for uses above Lake Mead;[70] also agrees to recognize Nevada's contracts which also provide for pro tanto charge for uses above Lake Mead;[71] also agrees to recognize the rights of Utah and New Mexico to share in III(a). System uses and surplus available under the Compact.[72] If her contract is interpreted to mean that her 2.8 of III(a) uses is from the uses available from the first 7.5 of uses available to Arizona from the Lower Basin in accordance with the terms of the second paragraph of Section 4(a) of the Project Act and the control of the Compact, it would be in harmony with the Compact, Project Act, Limitation Act and her own contract. Her contract does not negative her 2.8 as being of III(a) uses. The report merely interprets it as solely from Lake Mead and therefore divorced from Article III(a). We submit this does violence to the controlling Compact, the provisions of Sections 4(a) and 5, and especially Sections 8(a), 13(b) and (c) of the Project Act and the provisions of her own contract making the Compact controlling. If Arizona's contract is interpreted as entitling her out of the main stream to so much of 2.8 of III(a) uses as are not already exhausted by prior existing rights

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[68]Section 7(h), M.R. Pg. 402.

[69]Section 13, M.R. Pg. 406.

[70]Section 7(d), M.R. Pg. 401.

[71]Section 7(f), Ariz. Contract, M.R. Pg. 402. Note Nevada Contract with its Article 5(a) pro tanto provision was made Jan. 19, 1944, M.R. Pg. 419. The Arizona Contract, Feb. 9, 1944.

[72]Ariz. Contract, Section 7(g), M.R. Pg. 402.

and contracts therefor and charging Arizona with her tributary existing right uses as a part of her III(a) rights, the Compact, Project Act, Limitation Act and contracts can all be reconciled. What Arizona may be short of as III(a) uses from the main stream she will gain as her part of excess or surplus therein. In any event, what is more important all Lower Basin states will be protected and share in III(a) uses as contemplated, and a uniform accounting as to all states will be available.

To further demonstrate, Utah and New Mexico are the only Lower Basin states that are not involved directly in main stream uses. The New Mexico uses on the Gila System have been settled. If there are post 1929 or future Utah or New Mexico uses from tributaries above Lake Mead that are to be settled herein—and they should be—it is very probable they could be settled quantitatively by stipulation. In Nevada and Arizona the question of each state allowing further tributary development would be cared for by the pro tanto deduction principle of the using state's rights. The problem between main stream and such tributary uses as to priority is a state problem under their own law.[73] Arizona's contract recognizes Nevada's contract for 300,000 a.f. per a. of III(a) and 1/25th of any surplus.[74] Arizona's contract recognizes the California contracts for 4,400,000 a.f. per a. of III(a) plus one-half of the surplus.[75] Arizona's contract recognizes the right of New Mexico and Utah to share

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[73]See Section 18 Pro. Act, M.R. Pg. 395.

[74]See Section 7(f) Ariz. Contract, M.R. Pg. 402.

[75]See Section 7(h) Ariz. Contract, M.R. Pg. 402.

in III(a) and surplus.[76] Arizona's contract recognizes the pro tanto charges for any present or future uses above Lake Mead.[77] Arizona's contract provides that the quantities involved in her contract from Lake Mead are, "Subject to the availability thereof for use in Arizona under the provisions of the Colorado River Compact and the Boulder Canyon Project Act—".[78] Therefore, if the Arizona contract is interpreted according to its own terms and the Compact and Project Act, we submit she gets her quantities of III(a) uses from the *System* and her surplus from the main stream. As stated before—what she loses as III(a) from the main stream she gains as surplus from her contract designated share. That is the deal she made by her own contract. That, we submit, harmonizes all contracts and complies with the Compact, Project Act and Limitation Act, and enables an orderly administration of the System in the Lower Basin.

Administration

This brings up the matter of the necessities as to administration of the uses available to the Lower Basin and of a Decree herein. There are several departments of the United States that are competitive with each other as to control. The Department of Interior has conflicting interests within the Department. The State Department concerning the Mexican Treaty, the Army Engineers with respect to navigation and flood control are interested. All of these interests are competitive

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[76]See Section 7(g) Arizona Contract, M.R. Pg. 402.
[77]See Section 7(d) Arizona Contract, M.R. Pg. 401.
[78]Beginning of Section 7(a) Arizona Contract, M.R. Pg. 400.

not only internally but as to each Lower Basin state. The states are competitive with each other.

The matter of a Compact accounting interbasin, as well as the unavoidable Compact accounting between Lower Basin states, is made necessary but the agency for administration is not set up.

Accounting for existing right III(a) uses and other uses involved in the accounting is provided for in the Compact by the consent of the Compact states to the inclusion of tributaries as a part of the System.

It is submitted that it is desirable as well as necessary in the settling of Federal questions as well as state questions that the Court appoint a Commissioner or Commission to administer the entire matter in the Lower Basin under the direction of this Court.

The Master has arrived at an appropriate way of administering tributary uses once established. It is to require the using state annually to list and account for all such uses to the end of an accounting so as not to exceed the limit locally on such uses. A Commissioner or Commission could best supervise this under the authority of the Court in administration of the Decree.

The Master has also furnished a possible pattern in the furnishing of any details needed by a Commissioner or Commission to administer the System in the Lower Basin. The Master provides for a two year period within which the states shall furnish to this Court and to the Secretary (and we now suggest to the Commission instead) a list of present perfected rights claims as of June 1929 with claims of priorities, etc.[79] We sub-

[79]Art. VI, Proposed Decree, M.R. Pg. 359.

mit that if this Court adopts the interpretation of the Arizona contract herein believed to be proper—then, where there is anything left beyond the details of the trial as to existing right uses or post 1929 uses or claims on surplus, those claims could be filed with the Commission and if there is disagreement, the areas of such be referred to another Master for limited hearings. By this process, formula, or yardstick, the quantitative and priority claims of all states can easily be settled to the end that as between Basins and as between states there can be an orderly administration of the whole subject.

It is to be remembered that water rights and rights of use to water are not administered on the basis of annual crop rotation, or market conditions but on a right of use basis. Therefore, the formula only needs to define the limit of existing rights in each state for areas or projects and the administration would be able to see to it that those limits were not exceeded. Water within specified rights and not used would either go from tributaries to the main stream or on the main stream remain in reservoirs.

Miscellaneous

There are diversionary matters in Briefs in opposition to California which Imperial wishes to clear up.

Source of Imperial Water:

The implication is made by Arizona[1] that the source of the water supply to Imperial Valley was not from appropriations or diversions in California, but from Mexico. The Imperial Valley supply was diverted in California North of the Mexican Border and carried by

[1]Ariz. Op. Br. last paragraph Pg. 12.

canal into and through Lower California, Mexico back into then San Diego, now Imperial County, and there distributed by canals of the California Development Company, the California appropriators, and later by Imperial Irrigation District, to local mutual water companies for local area distribution.[2] In 1916 Imperial District acquired the properties of the California Development Company and in 1922 the mutual water companies.[3] That the diversion works in California, the transmission works through Mexico and into the United States and the canal system in California were considered and held by the Supreme Court of California to be all one System and one project is clearly shown in the case of *Title Insurance and Trust Company vs. California Development Co., 171 Cal. 173 at 179 et seq. (1915)*. An interesting review of the history of the project is there detailed.

Alleged Waste in Imperial Valley:

Arizona claims that of the water diverted from the Colorado River for Imperial Valley, Imperial District is wasting into the Salton Sea approximately one million acre feet of water per year.[1] As there is not enough water available to all the agricultural agencies in California for California agricultural and domestic uses, i.e.,

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[2]The appropriations were from California points. See Cal. Exs. 70-90, Tr. 6903, 7175; also see engineering report Cal. Ex. 69, Tr. 6894, 7182. The original diversion gate, Chafey, was in California, Tr. 7037-7042; this was in the vicinity of Hanlon Heading the area for the permanent works from which the supply was diverted in California. See Cal. Ex. 50 and Tr. 6914, 6988, 7038. The capacity was 10,000 second feet, Tr. 7200.

[3]Cal. Exs. 104 and 105, Deeds, Tr. 6936, 7175 and Cal. Exs. 167 and 167B-N, Tr. 7553 and Tr. 7049.

[1]Ariz. Rp. Br. Pg. 134.

3,850,000 a.f. per a. plus 300,000[2] to supply all the lands and need within those agencies, we submit that anything but unavoidable losses—termed here waste—will not occur.

However as so much is made by Arizona as an item of prejudice, we take leave to reply.

The Salton Sea is at the bottom of a large drainage area of approximately 7,500 square miles of which about 1,000 square miles is in Lower California, Mexico.[3] The extreme depth is 273 feet below sea level.[4] It is the site of an ancient inland lake.[5] The drainage area is shown generally on a map showing Imperial, Coachella and Mexicali Valleys and the surrounding mountain and desert areas included.[6]

The Sea was recreated in the 1905-07 flood when the entire flow of the Colorado River ran into and through Imperial Valley.[7]

The constant irrigation of ever-increasing acres in Imperial Valley resulted in irrigation water penetrating beneath the surface until prevented from going to depths because of the nature of the soil. As a result, a large underground body of highly saline water collected throughout the Valley. This underground water, because of its saline quality and water logging of land for lack of drainage, caused some lands to go out of production.[8] This brought about drainage stud-

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[2]See Palo Verde Contract, Sections 3 and 6 of Article (6) M.R. Pgs. 425, 426.
[3]Tr. Pg. 6461, Ls. 3-14.
[4]Tr. Pg. 6464, corrected 6469, L. 9.
[5]Cal. Ex. 46, Tr. 6447, 7019.
[6]Cal. Ex. 47, Tr. 6459, 7264.
[7]Tr. 6522 and see photo of flow, Cal. Ex. 146, Tr. 7400.
[8]Tr. Pg. 7906.

ies in 1922[9] resulting in bond issues to finance a drainage program.[9] The result was the ultimate construction of a network of open drainage canals throughout the Valley to try to drain off this accumulation[10] These drains directed the drainage water to Salton Sea.[11] Some 1400 miles of these drains were constructed.[12]

But open drains alone did not drain off this huge accumulation of saline underground water.[13] In 1929 a program of underground tile leach lines to drain the water off to the drainage ditches was started.[14] This has been beneficial and resulted in some 5,000 miles of tile drains covering about 200,000 acres. Most of the lands will have to be tiled eventually.[15] Thus there is being leached out from the soil the highly saline stored up waters. The tile drainage water will carry out about 5½ tons of salt per acre foot of water leached out.[16] By this process Imperial Valley has been putting into the Salton Sea much larger quantities of salt than have been coming into the Valley in irrigation water from the Colorado River.[17] This is one source of water to the Salton Sea from Imperial Valley.

Another source of drainage water to the Sea is from what is called "salt balance" requirements. As each

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[9]Tr. Pg. 7904.

[10]Cal. Ex. 240, Tr. 7914.

[11]Tr. 7907, L. 13.

[12]Tr. 7915, L. 14.

[13]Tr. 7908, L. 16.

[14]Tr. 7910, L. 19-7911, L. 3.

[15]Tr. 7914, L. 8. For general description of tiling see Tr. 7911 et seq., also Tr. 7917.

[16]Tr. 8202 et seq.

[17]See Cal. Exs. 242, 243, Tr. 7986-7991.

acre foot of water is brought into Imperial Valley it carries with it quantities of salt that is spread on the land by irrigation. As this salt does not evaporate and little is taken up by the plants, there would gradually accumulate tremendous tonnages of salt in the top soil if not forced down and out into tile or natural drainage means by the application of enough water to drive the accumulation down and out. By this process the salt content in the soil will become the same as the content of irrigation water being used.[18] The question of the quantity of water that needs to be applied to the surface over and above the amount the plants consume, and evaporation from the surface was the subject of extensive study and testimony. On the basis of there being over the extended future a salt content of 1.25 tons of salt per acre foot of water coming into Imperial Valley, the studies showed the need for the water to be applied in addition to said plant consumption and surface evaporation was and will be about 22%.[19]

It is, however, not our purpose here to argue the exactness of the requirement. We merely here point out that to maintain "salt balance" as above discussed a certain quantity of water must be applied to the surface and forced down and out into tile and drainage lines to get rid of the excess salt in the root zone and to keep the soil from becoming too salty for production. This process is going on. Therefore, this class of drainage water also has to go to the Sea. In a project of the size of the Imperial Irrigation District—the lar-

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[18]Tr. 7981, 7996.

[19]See the testimony of Dr. Fireman, an expert on the subject. Tr. 20515 et seq., 21357 et seq., and 21988 et seq. Also see Cal. Exs. 5201, 6101-6103-A, particularly Ex. 6104, Tr. 21391 et seq., also testimony of Dowd, Tr. 8199-8204, Cal. Ex. 283.

gest such in the United States—there is inevitably such drainage. Also other operational losses. The Salton Sea also receives the drainage water of mountain rains and drainage from Mexicali Valley and Coachella Valley.

Arizona also recognizes and uses water for "salt balance" and has recognized quantities of regulatory loss—called by Arizona as to Imperial—waste.[20]

In any event the project efficiency of Imperial was established as almost the best of any irrigation project in the Lower Basin.[21]

The quantity of drainage called waste may furnish a diversion, but, we submit, not a matter of substance on the merits.

Measure of Present Perfected Rights:

The Master defines the measure of present perfected rights as the quantity applied to use[1] as of June 25, 1929, and not the capacity of existing works.[2] The Master misunderstood Imperial's contention.

Imperial does not contend that the capacity of the works is the sole measure or that there can be a perfected right to more than the quantity needed for the project, merely because a larger quantity is claimed in notices of appropriation or because of the large capacity of the works.

Imperial does claim that the proper definition is for that quantity necessary for the completed project as

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[20]Ariz. Ex. 65-65A, Pg. B-13; also Table B-5 following Pg. B-15; Tr. 3292.

[21]Tr. 20781, 21313, Cal. Exs. 5106, Tr. 20768, Ex. 5107, Tr. 20768, Tr. 20767, Ex. 5108, Tr. 20769; also see Cal. Ex. 3049, Tr. 19875, Cal. Ex. 5106-5108, Tr. 20768-9.

[1]M.R. Pg. 308, next to last paragraph.

[2]M.R. Pg. 308, last paragraph.

originally contemplated, if within the quantities claimed, and if works therefor to the needed capacity have been constructed or are being constructed—all provided—due diligence has been exercised from the time of claim of appropriation and that this diligence has been exercised—both as to construction of the final project work and the application of water to use.

Imperial does claim that, especially with respect to large projects, the whole protection to appropriative rights by priority would be defeated if the rights of a project could be defeated, though 99% complete merely because water had not yet been run through a long and expensive system of works or only delivered to a portion of the area to be served.

That this is the recognized rule of appropriation under Western water law as defined by the Courts of last resort of the Western states and as well as by this Court is briefed in Volume III (Agencies) of the April 1, 1959 Findings and Conclusions and Briefs of California. It is in said volume under Imperial Section, Pages I.I.D.-B10-B52. See especially on necessity of recognizing rights in projects to which full supply of water has not yet been delivered, I.I.D.-B28-B52. For the sake of brevity we do not repeat here but ask reference thereto:

Federal Constitutional Claims—Moot:

The United States claims several United States constitutional powers as supreme and giving freedom of control to the United States through the Secretary of Interior. These powers are claimed to be free from the necessity of recognition of any application of the West-

ern water law of appropriation or any recognition of states' rights or controls.

We submit that we do not need herein to argue or decide those powers or their extent. We contend that the Congress of the United States by ratification of the Compact determined this in part.[1] We also contend that Congress in the passage of the Project Act decided these questions and bound the exercise of any powers of the United States to the framework of the Compact.[2] Congress also provided that nothing should be construed as interfering with such rights as the states now have, with respect to the appropriation, use or control of waters within their borders[3] and made the Project Act a supplement to the Reclamation laws.[4]

We shall not here review the many Acts of Congress in the Reclamation laws or in other Acts giving recognition to the law of appropriation and directing the Departments and Agencies of the United States to observe those state laws.[5]

We wish here to point out that the waters herein being dealt with are *not un*appropriated waters except possibly to a limited amount.

We submit these questions of constitutional powers of the United States are moot herein.

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[1]Article III of the Compact provided for the basis of agricultural and domestic uses and use rights, i.e., beneficial consumptive use of System for existing rights. Also for recognition of present perfected rights in Article VIII, M.R. Pgs. 373 and 376.

[2]Section 8(a) Pro. Act provides that the *United States,* its contractees and appropriators of water *shall observe* and be *subject to* and *controlled* by the Colorado River *Compact.* See also Sections 8(b) and 13(b), M.R. Pgs. 389, 393.

[3]Section 18, Pro. Act., M.R. Pg. 395.

[4]Section 14, Pro. Act, M.R. Pg. 394.

[5]See compilation in Cal. Reply Brief before Master at Pgs. B-1 through B-21.

There is one contention that we submit this Court might well put to rest. It is the claim of the United States that it owns all the waters in the areas acquired by conquest or purchase from foreign countries. It is urged periodically and if ever sustained, such a decision, we believe, would work endless havoc in many sections of the United States and in many regards. We do not argue the matter of Federal control over navigable water for commerce or flood control, nor will we burden the Court with the vast number of cases holding title to the bed and banks of navigable streams to be in the states and not the Federal Government.[6] This Court has held that any title acquired by the Federal Government from foreign countries is held in trust for the states, including future states.[7]

The more important point is that Congress has directed the exercise or non-exercise of those Federal powers in relation to navigable and non-navigable streams. Contrary to the contention of the United States that Congress dealt only with non-navigable waters, attention is called to the Act of July 26, 1866 that recognized the law of appropriation in the Western states and provided therein for the use of public lands for canals, etc. This Act was not limited to non-

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[6]Starting with Martin vs. Waddell, 16 Peters 367 at 411; 10 L.Ed. 997 at 1013 (1842); Pollard vs. Hagan, 3 Howard 212 at 230; 11 L.Ed. 565 at 574 (1845); Mumford vs. Wardell, 6 Wallace 423 at 436; 18 L.Ed. 756 at 761 (1867); U.S. v. Utah, 283 U.S. 64 at 71 and 75; 75 L.Ed. 844 at 849 at note 1 (1930). The rule si also recognized as to inland navigable waters in U.S. vs. Cal., 332 U.S. 19 at 36; 91 L.Ed. 1889 at 1898 (1946).

[7]Pollard vs. Hagan, 3 Howard 212 at 229; 11 L.Ed. 565 at 573 (1845); Weber vs. Board of Harbor Commissioners, 18 Wall. 57 at 65-66, 85 L.Ed. 798 at 802 (1873); U.S. vs. Utah, 283 U.S. 64 at 71-72, 83; 75 L.Ed. 844 at 853 (1930).

navigable waters.[8] This Court held that Act and other Federal recognition of the law of appropriation not to create the right but to recognize it as existing law on the subject.[9] The supervision of diversions from navigable streams was placed in the hands of the Secretary of War and Army Engineers, who issued permits therefor.[10] Many other Acts were passed in this regard and they are reviewed at length in the California Reply Brief before the Master, Pages B-1 through B-21, to which we refer for the citations and copies.

We submit Congress has acted covering the subject and again we say constitutional powers of the United States are a moot matter herein.

Project Act Benefits to California:

Our opponents point for some purpose to the benefits California has gained from the Project Act works. We are proud of them. Some of these defendant agencies and other California agencies by contracts underwrote the costs, not only of the All-American Canal works, but Hoover Dam and Lake Mead facilities as required by the Act.[12] Arizona did not.

We submit that it is not in harmony with the Compact, Project Act, Limitation Act or the contracts or previous decisions of this Court or equity to deprive

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[8]14 Stat. 251, now Title 43, U.S.C.A. 661.

[9]Atcheson vs. Peterson, 20 Wall. 507 at 513-514; 87 L.Ed. 414 at 416 (1874); Broder vs. Natoma Water Co., 11 Otto 274 at 276; 25 L.Ed. 790 at 791.

[10]30 Stat. 1151 (1899) as now amended, to be found 33 U.S.C.A. Secs. 401-403, and others.

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[12]See Section 4(b) of Pro. Act, M.R. Pgs. 383-384.

the long established completed projects in California for a prospective, now non-existent project.

We appreciate the indulgence of this Court in considering our views.

Respectfully submitted on behalf
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